

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIMOTHY R. CUMMINGS

Claimant

VS.

KANSAS PALLET & WOOD RECYCLE, INC.

Respondent

AND

KANSAS BUILDING INDUSTRY

WORKERS'S COMPENSATION FUND

Insurance Carrier

Docket No. 250,570

ORDER

Both claimant and respondent appeal Administrative Law Judge Jon L. Frobish's February 10, 2000, preliminary hearing Order.

ISSUES

Claimant seeks medical treatment and temporary total disability benefits for an alleged June 3, 1999, work-related accidental injury. The Administrative Law Judge found claimant injured his neck at work but denied claimant preliminary benefits because claimant failed to provide respondent with timely notice of the accident.

On appeal, claimant contends he proved he provided respondent with the required timely notice of accident and the requested preliminary hearing benefits should be awarded.

Conversely, respondent requests the Appeals Board affirm the Administrative Law Judge's finding that claimant failed to provide timely notice of the accident. The respondent also contends the claimant failed to prove he suffered a work-related accidental injury on June 3, 1999.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds the preliminary hearing Order should be affirmed.

The Administrative Law Judge found claimant proved he injured his neck on June 3, 1999, while working for the respondent. Claimant testified he was driving a forklift at work, on the day of the accident, when it hit a rock and a hole jarring his neck. Claimant immediately felt pain and discomfort in his neck, across his shoulders, and down his left arm. As claimant continued to work, the pain persisted until he sought medical treatment on his own on June 14, 1999.

The medical records of claimant's family physician, Sharon R. Norris, M.D., were admitted into evidence at the preliminary hearing. Dr. Norris' June 14, 1999, medical note indicates claimant provided her with a history of injuring his neck while driving a forklift at work on June 3, 1999. Dr. Norris diagnosed a muscle neck strain, prescribed medication, neck stretching, and strengthening exercises.

Claimant returned to see Dr. Norris on June 21, 1999, significantly improved. The doctor continued claimant on muscle relaxers as needed and advised claimant to continue the neck exercises.

Claimant did not return to see Dr. Norris again until September 22, 1999. At that time, claimant complained of continued neck pain and advised the doctor he had quit his job because of the pain. Dr. Norris had claimant undergo an MRI examination on September 29, 1999. The MRI examination showed a small ventral disc bulge at C3-4. Because of this finding, Dr. Norris referred claimant for further examination to orthopedic surgeon, Kris Lewonowski, M.D.

Dr. Lewonowski saw claimant on November 12, 1999. Claimant provided Dr. Lewonowski with a history of injuring his neck at work while driving a forklift on June 3, 1999. This was consistent with the history he provided Dr. Norris. Dr. Lewonowski's impression was cervical pain with left upper extremity radiating numbness. He scheduled claimant to undergo an EMG/nerve conduction study of the left upper extremity. The study, however, was not performed because respondent's insurance carrier refused to authorize payment.

The Appeals Board finds that claimant's testimony, coupled with the consistent history claimant provided both Dr. Norris and Dr. Lewonowski, is persuasive to conclude claimant injured his neck driving a forklift at work on June 3, 1999.

The timely notice issue is more of a problem because there is direct conflicting testimony concerning this issue. Claimant and three witnesses for the respondent all testified at the preliminary hearing before the Administrative Law Judge. The respondent is a company that claimant had previously owned. Three years before the June 3, 1999,

accident claimant sold the company to Dean Frankenbery. Claimant remained as an employee for the respondent working in a supervisory capacity. Claimant testified he told Mr. Frankenbery he injured his neck at work on June 3, 1999. Furthermore, claimant testified he told Mr. Frankenbery numerous times about his continued problems with his injured neck before quitting his employment on August 24, 1999.

Mr. Frankenbery testified he knew claimant had a stiff neck, but claimant had made complaints about a stiff neck on numerous occasions over the years. Mr. Frankenbery testified claimant did not notify him that his stiff neck was related to his work until after claimant quit work on August 24, 1999. Mr. Frankenbery also testified claimant did not quit work because of his alleged neck injury. Claimant quit because the job was putting too much pressure and stress on him and the job was affecting his family life. Mr. Frankenbery testified claimant attempted to return to work and Mr. Frankenbery did not allow him to return. At that time, claimant notified Mr. Frankenbery that his neck injury was caused by the work and he needed medical treatment for the injury.

By finding claimant failed to give respondent timely notice of the work-related accident, the Administrative Law Judge simply did not believe claimant's testimony. Also, damaging to claimant's credibility is Dr. Norris' September 22, 1999, medical note. In that note, Dr. Norris indicates claimant told her, "He [claimant] apparently did not report the initial injury as a work comp (sic) injury." The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusions as he had the opportunity to assess the witnesses' credibility. The Appeals Board, therefore, affirms the Administrative Law Judge's conclusion that the claimant failed to give respondent timely notice of the accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's February 10, 2000, preliminary hearing Order should be, and it is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
James A. Cline, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director